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No. 99-1131

In the

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 2 2000
CLERK

THE MEDICAL SOCIETY OF NEW JERSEY; and W.C., M.D.,

Petitioners,

v.

BERNARD ROBINS, M.D., individually and in his official capacity as President of the New Jersey State Board of Medical Examiners; ELEANOR BERNSTEIN, individually and in her official capacity as a Deputy Attorney General of the State of New Jersey; THE NEW JERSEY BOARD OF MEDICAL EXAMINERS; THE DIVISION OF CONSUMER AFFAIRS OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE DIVISION OF LAW OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE STATE OF NEW JERSEY; and "JOHN & JANE DOES 1-20", whose real identities are at this time unknown to the plaintiffs,

Respondents.

On Petition For a Writ of Certiorari to The Supreme Court of The State of New Jersey

BRIEF IN OPPOSITION

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THE QUESTION PRESENTED FOR REVIEW

WHETHER CERTIORARI SHOULD BE DENIED WHERE THE APPELLATE DIVISION CONCLUDED ON THE PRINCIPLES ENUNCIATED BY THIS COURT IN *NEW YORK V. BURGER* THAT THE NEW JERSEY BOARD OF MEDICAL EXAMINERS, AFTER A FULL EVIDENTIARY HEARING AND ACTING PURSUANT TO A COMPREHENSIVE REGULATORY SCHEME WHICH CLOSELY REGULATES THE PRACTICE OF MEDICINE, PROPERLY ORDERED THAT A WARRANTLESS ADMINISTRATIVE INSPECTION BE MADE OF A LICENSEE'S OFFICE, INCLUDING DRAWERS AND CABINETS WHERE OUTDATED MEDICATIONS MIGHT BE STORED AND WHERE, PRIOR TO THE ORDERED INSPECTION, LIMITED JUDICIAL REVIEW WAS AFFORDED BY WAY OF STAY APPLICATION AND NO PROPERTY DEPRIVATION WAS VISITED UPON THE LICENSEE BY THE BOARD'S ACTION.

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COUNTERSTATEMENT OF THE CASE

On June 26, 1997, the New Jersey State Board of Medical Examiners (hereinafter "Board") directed that an inspection of the office of W.C., a physician licensed by the Board, be performed following its receipt and review of a patient complaint which alleged that W.C. had dispensed outdated prescription legend drug medications and had also failed to issue a detailed report. For that conduct the Board issued a private letter cautioning that W.C.'s staff may be dispensing outdated medications. (Ra3)[1]

On October 30, 1997, Board investigators went to W.C.'s office during regular business hours, presented her with a Demand for Inspection signed by a Deputy Attorney General and began an inspection of the receptionist area.[2] After

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[1] "Ra" refers to the appendix filed in the Superior Court, Appellate Division, the proceeding below, on behalf of the respondents.

[2] The New Jersey statutory provision upon which the Board's inspection was predicated states in pertinent part:

> Whenever it shall appear to any board, the director or the Attorney General that a person has engaged in, or is engaging in any act or practice declared unlawful by a statute or regulation administered by such board, or when the board, the director or the Attorney General shall deem it to be in the public interest to inquire whether any such violation may exist, the board or the director through the Attorney General, or the Attorney General acting independently, may exercise any of the following investigative powers:
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> * * *
>
> c. Inspect any premises from which a licensed profession or occupation is conducted;
>
> d. Examine any goods, ware or item used in the rendition of any professional or occupational service;
>
> e. Examine any record, book, document, account or paper maintained by or for any professional or occupational

opening a single cabinet door, the investigator was told by W.C. that, on advice of her counsel, cabinet doors and drawers could not be opened. The door to the cabinet was immediately closed by the investigator without observation as to its contents. (Ra26, fn 11, 29) Upon advising W.C. that the inspection could not be performed without access to cabinets and drawers, W.C. telephoned her attorney who advised the investigator that any inspection must be limited to that which was in plain view within the office. The investigators then performed a brief walk-through of the office during which two (2) bottles of topical antiseptics or sterilizing solutions, Betadine and Cidex, containing expiration dates of 1982 and September 1997 respectively, were observed. (Ra29) No observations of patient files or other office records were attempted or made. (Ra30)

On November 3, 1997, the Board, on the Attorney General's complaint, ordered W.C. to show cause why she should not be disciplined for failing to cooperate in the Board's inspection. The complaint alleged that W.C.'s "plain view" limitation and prohibition of full access to her office violated a Board regulation requiring licensees to cooperate in investigations by making their premises, records and related goods available for inspection.[3]

> licensee in the regular course of practicing such profession or engaging in such occupation .... [N.J.S.A. 45:1-18].

[3] The uniform regulation, adopted by all professional licensing boards within the New Jersey Division of Consumer Affairs, provides in pertinent part:

> A licensee shall cooperate in any inquiry, inspection or investigation conducted by, or on behalf of, a board ... into a licensee's conduct .... A licensee's failure to cooperate, absent good cause or *bona fide* claim of a privilege not identified in N.J.A.C. 13:45C-1.5 as unavailable, may be deemed by the board ... to constitute professional or occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) ... and thus subject

Following a full evidentiary hearing before the Board in which the petitioners advanced various constitutional and State statutory defenses, the Board issued a Final Decision and Order dated December 25, 1997.[4] The Board found that W.C.'s refusal to permit inspection of her office records and goods, including items contained in cabinets and drawers, constituted a failure to permit an inspection and examination of premises, goods and records maintained in the regular course of the practice of medicine and surgery, and, as such, violated the Duty to Cooperate regulation and constituted professional misconduct under State law. (N.J.S.A. 45:1-21(e)). (Ra30) Based upon these findings the Board ordered

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a licensee to disciplinary action pursuant to N.J.S.A. 45:1-21(h) ....

And further:

> (a) The following conduct by a licensee may be deemed a failure to cooperate and, therefore, professional or occupational misconduct or other good cause or grounds for suspension or revocation of licensure:
>
> 4. The failure ... to provide access to any premises from which a licensed profession or occupation is conducted. Included within this paragraph shall be the failure to ... permit the examination of any goods, ware or item used in the rendition of the professional or occupational service and the failure to grant access to records, books or other documents utilized in the practice of the occupation or profession. [N.J.A.C. 13:45C-1.3(a)4].

Violation of a Board regulation may subject a licensee to disciplinary action under New Jersey's Uniform Enforcement Act (N.J.S.A. 45:1-21(h)).

[4] Petitioner, Medical Society of New Jersey was permitted to intervene and present limited legal arguments challenging the complaint.

a new inspection to be conducted not later than January 8 and directed W.C. to fully cooperate in the inspection by permitting access to:

> ... the books, records, documents, equipment and other items in her office maintained for the practice of medicine. The inspection shall include but not be limited to items located in her drawers and cabinets of the office. (emphasis added)

The Board's order further provided that items deemed "personal" or which were subject to a good faith belief as being within an attorney-client privilege could be withheld upon identification to the Board. (Ra31) A civil penalty of $1,000 was also imposed, payment of which was stayed conditioned upon W.C.'s compliance with the ordered access. No suspension of licensure was ordered, and the Board's action was not reported to the National Practitioner's Data Bank. (Ra30-31)

Prior to the date of the ordered inspection, petitioner attacked the Board's order by filing a complaint in a State trial court alleging violation of 42 U.S.C. §1983. (Pb7) On transfer of that action to the Superior Court, Appellate Division, petitioners sought a stay of the Board's order. Within that application petitioners filed a brief in which essentially the same constitutional arguments advanced here were asserted and rejected by the Court. (Pbrf., Ra136, 7) Interlocutory review of that decision was denied in the Supreme Court of New Jersey.[5] A 20 minute inspection was thereafter conducted on February 6, 1998 which disclosed no additional outdated medications. (Pa6-7)

On June 2, 1999, the Superior Court, Appellate Division, dismissed petitioners' appeal as moot for want of disciplinary sanctions or civil penalty exaction given W.C.'s ultimate

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[5] The District Court dismissed petitioners' complaint for want of jurisdiction.

compliance with the Board ordered inspection and the Board's adoption of a new regulation prohibiting the maintenance of outdated medications by licensees.[6] The Court also remanded the matter to the trial court for further proceedings on petitioners' 42 U.S.C. §1983 complaint. In so holding, the Court rejected the petitioners' central legal argument that the Board's warrantless administrative inspection violated the Fourth Amendment. It further concluded that the New Jersey statutory provision, N.J.S.A. 45:1-18, in expressly authorizing such inspections, when applied to the practice of medicine, satisfied well established precedents of both this Court and New Jersey courts, holding that in settings involving closely regulated commercial activity, substantially diminished privacy expectations are present such that given compliance with the tests articulated by *New York v. Burger,* 482 U.S. 691 (1987), a judicial warrant is not required for administrative inspections of closely regulated activities.

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[6] The regulation was not in effect at the time of the inspection (Pa3, fn3). The Board in its decision found that maintaining and dispensing substantially outdated medications deviated from appropriate standards of medical care. (Ra18, fn)

REASONS FOR DENYING THE WRIT

THE CENTRAL CONSTITUTIONAL ISSUE IN THIS CASE INVOLVED NOTHING MORE THAN THE APPLICATION OF WELL ESTABLISHED FOURTH AMENDMENT PRECEDENT OF THIS COURT HOLDING THAT WARRANTLESS ADMINISTRATIVE SEARCHES MAY BE AUTHORIZED IN CLOSELY REGULATED COMMERCIAL ACTIVITY AFFECTING THE PUBLIC INTEREST. SINCE THE APPELLATE DIVISION CLEARLY APPLIED THE STANDARDS ARTICULATED IN *NEW YORK V. BURGER* CORRECTLY AND GIVEN THE FACTS PRESENTED, FURTHER REVIEW BY THIS COURT IS NOT WARRANTED.

Notwithstanding petitioners' assertions to the contrary, a review of the decision below discloses two simple and straight forward holdings: (1) on the facts presented the matter was moot under State law principles given the absence of any license suspension or other property deprivation; and (2) the Board's ordered inspection was constitutionally compliant with this Court's holding in *New York v. Burger*, 482 U.S. 691 (1987). As to the former, the issue certainly is not one for further review by this Court, and as to the latter, there simply is no question concerning the correctness of the Appellate Division's application of the controlling law as announced in *Burger*.

It should be noted preliminarily that, contrary to the repeated assertions that W.C. was unconstitutionally deprived of a judicial hearing prior to the inspection of her office, the facts plainly show that, on advice of counsel, she initially restricted the inspection to open areas and items in "plain view". Except for a fleeting momentary look which was terminated on W.C.'s direction, no further inspection of drawers or cabinets was undertaken until after the holding of an evidentiary hearing by the Board and preliminary review by the Appellate Division and the Supreme Court of New

Jersey by way of applications to stay the Board's ordered inspection.[7]

It is long established that due process is not necessarily judicial process and that administrative proceedings may afford the same due process as judicial proceedings. *United States v. Ju Toy*, 198 U.S. 253 (1905); *Crane v. Hahlo*, 258 U.S. 142 (1922); *Den et al. v. Hoboken Land and Improvement Co.*, 18 How 272, 15 L.Ed. 372 (1856). Accordingly, the assertion that a hearing was denied before an opportunity to challenge the inspection is both factually and legally devoid of merit.

More fundamentally, however, this Court has repeatedly held that due process does not always require a predeprivation hearing. Thus:

> It is now well established that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (auth. omitted) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. (auth. omitted) This Court has recognized, on many occasions, that where a State must act quickly or where it would be impractical to provide predeprivation process, post-deprivation process satisfies the requirements of the Due Process Clause. (auth. omitted) Indeed, in *Parrat v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct.

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[7] Within those applications petitioners submitted a brief asserting essentially the same constitutional arguments asserted here The well-established test for a stay requires that an application demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent a stay, (3) the probability of harm to others will not be greater than the harm the movant will suffer absent a stay and (4) the public interest will not be adversely affected by a stay. *Sampson v. Murray*, 415 U.S. 62 (1973); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Crowe v. DeGioia*, 90 N.J. 126 (1982).

> 1908 (1981), ... we specifically noted that "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property. (auth. omitted) [*Gilbert v. Homar*, 520 U.S. 924 (1997)]

And see also *F.D.I.C. v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979). Obviously, where acts or practices within a physician's office imperil patient safety (as here) or otherwise implicate important public health, safety or welfare issues, the long established principle as restated in *Gilbert* becomes operative. Accordingly, nothing novel or important exists within the context of this case to justify further review by this Court as to any claimed right as to a predeprivation hearing.

Similarly, the conclusory assertion, without elaboration, that the Appellate Division erred in applying *Burger*, affords no basis for review. Initially, as noted by the court below, this Court, for Fourth Amendment purposes, has explicitly recognized a reduced expectation of privacy by the owner of commercial premises in a closely regulated industry. Thus:

> An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. See *Donovan v. Dewey*, 452 U.S. 594, 598-99, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262, 268-69 (1981). This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall v. Barlow's, Inc.*: "Certain industries have such a history of government oversight that no reasonable expectations of privacy, see *Katz v. United States*, 389 U.S. 347, 351-52, [88 S.Ct. 507, 511-12, 19 L.Ed.2d 576] (1967), could exist for a proprietor over the stock of such an enterprise." 436 U.S. 307, 313, 98 S.Ct. 1816, 1821, 56 L.Ed.2d 305, 312 (1978).

[*New York v. Burger*, *supra*, 482 *U.S.* at 700 (emphasis added)]

Significantly, petitioners do not assert that the *Burger* threshold prerequisite of a "closely regulated" activity is not satisfied. As the court below found, there can be no doubt that the medical profession is highly regulated by virtue of licensure, education and a plethora of other State regulatory requirements. Moreover, there is nothing constitutionally unique (nor do petitioners so assert) about a physician's office for the purpose of applying the *Burger* test.[8]

Similarly, the three prong test of *Burger*, given this satisfaction of the threshold requirement, is plainly met.[9]

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[8] To the extent that patient confidentiality interests arise, the New Jersey statutory scheme accommodates the same by affording confidentiality to all information obtained during an investigation prior to the filing of an administrative complaint. N.J.S.A. 45:9-19.3.

[9] Given the presence of pervasively regulated activity, the *Burger* test requires:

> First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made....
>
> Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme'....
>
> Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant.' (auth. omitted) In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that a search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. (auth. omitted) To perform this function, the statute must be 'sufficiently

Thus, there can be no question that the State has a substantial governmental interest in regulating physicians to ensure the providing of lawful, safe, proper and effective medical services to the public. The State's "paramount" obligation to protect the public's general health, is clear. Similarly, a warrantless inspection is both necessary and rationally related to the effective implementation of the regulatory scheme. Prompt and unfettered office inspections and visitations are obviously necessary to investigate complaints; to determine cleanliness and safe operation (including the providing of medications and the use of medical solutions within presumptively safe and effective periods following manufacture); to determine whether individuals are properly licensed to provide regulated health care services; and to determine whether any of a myriad of other unlawful acts have occurred or may occur which directly implicate the public's health, safety and welfare.

A warrant requirement would foreseeably impair prompt investigative responses thereby inhibiting effective enforcement activity. Given such considerations, and where, as here, the protection afforded by a warrant would be "negligible," this Court has held the Fourth Amendment's warrant requirement to be inapplicable. *New York v. Burger*, *supra* 482 U.S. at 710.

Finally, the statutory scheme as implemented by the Board's Duty to Cooperate regulation (N.J.A.C. 13:45C 1.2, 1.3(a)(4)) and in this case, its Final Decision and Order, clearly constitute an adequate substitute for a warrant. Thus,

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> comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. (auth. omitted) In addition, in defining how a statute limits the discretion of the inspectors ... it must be 'carefully limited in time, place, and scope.' (auth. omitted) [*New York v. Burger*, *supra*, 482 U.S. at 702-703]

N.J.S.A. 45:1-18(c), (d) and (e) and the Board's regulation put licensees on clear notice that State investigation by inspection of premises and the examination of goods and records used in the course of practicing the licensed activity may be expected where a violation of a statute or regulation has occurred or where it may be in the public interest to inquire whether such an unlawful act may exist. Since the statute when read on its face and, as applied by the Court below, plainly passes constitutional muster under *Burger* and given the absence of any articulated reason by petitioner to the contrary, the decision below requires no further review by this Court.

Petitioners advance a fusillade of bald assertions which seriously misstate prior holdings of this Court or certain facts within the proceedings below. Most clearly in this regard is the assertion that the only setting in which the Constitution does not compel a warrant is where Congress has determined that a "notorious industry" requires warrantless searches to further a regulatory scheme. (Pb13) Never has this Court articulated such a test, and the holding in *Burger*, as well as other cases, makes clear that the analytical touchstone in warrantless inspections and searches is whether a "special need" arises, as reflected by a setting where the privacy interests of the owner of property are diminished and the government interests in regulating particular businesses are concomitantly heightened. *New York v. Burger, supra* 482 U.S. at 702. *See also Veronica School District 47 J. v. Acton*, 515 U.S. 646 (1995) (student drug testing as condition for participation in athletics held "special need"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (drug testing for federal railroad employees held "special need") (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationer's home authorized by state agency regulation held "special need"). So too here. New Jersey's long established regulatory scheme for the practice of medicine adopted by statute and administrative regulations implicate highly regulated activity centered in licensure and ongoing oversight in order to protect the public's health, safety and welfare.

The court's decision below in applying *Burger* recognizes this principle and is completely consistent with the decisions of this Court which have sustained warrantless searches.

Similarly, petitioners' assertion that the holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) dealt with a "nearly identical" regulatory scheme to that involved here is patently erroneous. In *Marshall*, unlike the focused statutory enactment here which operates only within discreet regulated professions and occupations, the federal act (OSHA) provided for warrantless inspections of all businesses engaged in interstate commerce. Further, pursuant to administrative regulation, field inspections were authorized with local inspectors empowered to determine what businesses were to be inspected and when. The federal act did not, as here, involve a single pervasively regulated industry, and warrantless searches were found unreasonable primarily due to the unbridled discretion vested in the field inspector.

No such parallel exists here. The New Jersey regulatory scheme and the facts presented here reflect a statutory requirement that reasonable suspicion be found by high level state officials as a predicate for any inspection of a licensee's premises (N.J.S.A. 45:1-18(c)). That is precisely what occurred here, for when all is said and done, the primary operative facts involve nothing more than the State's licensing agency directing an inspection of a licensee's office after receipt of a patient complaint indicating the dispensing of outdated medications, later buttressed by investigator "plain view" observations of two additional outdated antiseptic substances in the licensee's office. This setting, as held by the court below, entails precisely the type of special need which this Court in *Burger* and its progeny have recognized in sustaining warrantless administrative searches against Fourth Amendment challenges. Accordingly, the narrow exception urged by petitioners provides no basis for further review by this Court.

Equally unavailing is the assertion of impropriety arising from the Attorney General's performing both a prosecutorial

and counseling function in the Board's disciplinary proceeding. Initially, petitioner fails to point out that under New Jersey statutes, the Attorney General is required to act as the sole legal adviser to State administrative agencies and to provide legal services in relation to litigation involving such agencies. N.J.S.A. 52:17A-4(c), (e). Further, petitioners neglect to advise the Court that separate deputy attorneys general performed the counseling and advisory functions in the Board proceeding and are subject to separate and distinct supervisory lines of authority with internal administrative safeguards in place to ensure independence and separation in the performance of the respective functions. Finally, of course, it is long established that the merger of functions within State administrative agencies, absent a showing of impropriety, does not *per se* effect a due process deprivation and that State licensing boards are entitled to a presumption of good faith when engaged in administrative decision-making in disciplinary proceedings. *Withrow v. Larkin*, 421 U.S. 35, 43, 55 L.Ed.2d 712, 728, 95 S.Ct. 1456, 1468 (1975). Nothing in the facts of this case or the law established to date by this Court supports any claim of impropriety sounding in merger of functions so as to warrant further review here.

The assertion that the Board's directed and ordered inspections were overbroad is also plainly without merit. Each element of both the initial Demand for Inspection and the Board's Final Order therefor was rationally related to a legitimate investigative need. Thus, licenses on W.C.'s premises would permit a determination of whether individuals dispensing medications, outdated or otherwise, were properly authorized by law to do so; records would identify who may have received outdated medications, when, and why, and what, if any, charges therefor were made; and access to equipment maintained in the office would disclose where outdated medications may have been stored. Petitioners' assertions notwithstanding, the Board's Final Order explicitly excepted from inspection any documents deemed confidential or privileged and subjected such documents to further Board

scrutiny, (Ra31) which ultimately was unnecessary given the brief and uneventful final inspection. In short, the claimed overbreadth urged by petitioners as a basis for further review, wholly apart from the absence of any cited prior authority of this Court indicating Fourth Amendment impropriety, is simply without factual support in the record below. Accordingly, review by this Court is not warranted.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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